IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE EIGHTH DAY OF APRIL
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE D.S.R.VARMA

WRIT PETITION NO : 2106 of 2005

Between:

M/s. Macawber Beekay Pvt. LTd., Beekay House,

L-8 Green Park Extn. New Delhi-110016, rep. By its Director **..... PETITIONER**

AND

1 Andhra Pradesh Power Generation Corporation Ltd., (APGENCO) Vidyut Soudha, Hyderabad, rep by its Managing Director
2 M/s. The Indure Pvt. Ltd., Indure House" Greater Kailash-II New Delhi-110048 rep by its Managing Director

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue Writ of Mandamus: (a) declaring the action of the 1st respondent in canceling the tender notification vide letter dated 2-2-2005 pertaining to work pertaining to design, engineering manufacture, assembling, third party inspection, packing and forwarding supply for site, intrasite handling erection, testing and commissioning of Ash Handling plant complete with required equipment and accessories for 2 X 210 MW units-3 & 4 for Rayalaseema TPP Stage-II of APGENCO and Seeking to call for fresh tenders for the said work as illegal and arbitrary(b) direct the 1st respondent-APGENCO to award the contract to the petitioner being L-1 for design, engineering, manufacture, assembling, third party inspection, packing and forwarding, supply for site, intrasite handling erection, testing and commissioning of ash handling plant complete with required equipment and accessories for 2X210 MW units-3 & 4 of Rayalaseema TPP Stage-II of APGENCO (Section-I and Section-II) in pursuance of the petitioner's bid dated 01-10-2004 and (c) pass such other and such further writ, directions(S), order or orders and any such further orders(S).

Counsel for the Petitioner: MR.V.R.N.PRASHANTH

Counsel for the Respondent No.: MR.SAMINENI KISHORE

The Court at the stage of admission made the following:

ORAL ORDER:.

Heard Sri V.R.Reddy, the learned counsel appearing for the petitioner, Sri G. Vidyasagar, the learned senior counsel appearing for the first respondent and Sri Md. Ali, the learned counsel appearing for the second respondent.

This Writ Petition is filed challenging the action of the first respondent in canceling the tender notification vide letter No. CPP/321/RTPP-II/APR Vol.9/D.No. 04/2005 dated 2.2.2005, wherein and whereby the first respondent had taken a decision to cancel the bid process and go on for fresh bids.

The factual backdrop in brief is as under:

The first respondent issued a notification calling for tenders for certain works, the details of the nature of works are not worth mentioning.

The tender process would be mainly in two phases; the first phase in normal parlance is called as technical phase and the second phase as price bid stage. At the first stage, the eligibility etc., of each tenderer would be estimated after opening the tenders and if the participants are successful in satisfying the requirements, the second phase would be resorted to and basing on the finality of the second stage also, eventually, orders will be passed giving the tender to the lowest tenderer subject to the fulfillment of other formalities, which are essential. Accordingly, out of five tenderers, two tenderers were eliminated owing to the reason that they did not stand to the required qualifications of the first stage. The bids were opened insofar as the remaining three tenderers who passed through the first stage and reached price bid stage. Resultantly, the petitioner was found to be the lowest tenderer on 5.1.2005.

Be that as it may, by virtue of the impugned proceedings, the tender process had been cancelled. Hence, the writ petition.

The established principle is that it is the prerogative of the Government functionary to cancel tenders at any time, but the same shall not be arbitrary nor there is any indefeasible right vest with the participants in the tender. On any irregularity if found, i.e., may be on the part of the participants, may be on the part of the officials, may be because of some lapses found in the tender process, tender can

be subjected to cancellation.

Now the said order of cancellation had been challenged by the petitioner, who was the lowest tenderer.

The learned senior counsel appearing for the petitioner submits that there are absolutely no reasons assigned in the impugned proceedings, while canceling the tender process. It is submitted that notification was issued way back in 2004 precisely on 15.2.2004 and from then onwards, the process has started and went through and eventually the opening of price bid tender ended up on 5.1.2005 and thereby about a year time had been spent on doing this exercise. He further brought to the notice of the court that necessary clarifications were also sought at the threshold by the petitioner from the first respondent, which have been answered appropriately. Hence, he contends that after the first respondent putting the participants, particularly the petitioner, to the arduous tender procedure and after finding the petitioner as a lowest tenderer and at the verge of striking the tender in his favour, cancellation of the same, with no reasons, is absolutely arbitrary.

Per contra, the learned counsel appearing for the first respondent filed a counter affidavit stating, inter alia, that for the reasons stated in the counter affidavit, the impugned order was passed.

From a bare perusal of the averment made in the counter affidavit filed by the first respondent, few important averments catch the eye of the court. *Firstly*, that the difference between L-1 (the petitioner) and L-3 (another successful tenderer, who got through the first phase) was very vast. *Secondly*, the so-called difference between L-1 (petitioner) and L-2 (respondent No.2 herein) was not disclosed. *Thirdly*, in a meeting convened on 24.1.2005, a decision was taken to cancel the tender process. *Fourthly*, the reason for such a decision appears to be that M/s Desein India Pvt. Limited, which was the project consultancy, was sister concern of the second respondent and when it was noticed by the Board, it felt desirable to cancel the whole tender process in order to maintain transparency and *lastly*, while repelling the averments made by the petitioner in the affidavit filed in support of the Writ Petition, it is stated that the allegations were only against L-2 (respondent No.2) but not against L-1 (petitioner). This is obviously, in view of the specific averments made by the petitioner that the cancellation was at the instance of the second respondent. However, this averment of the petitioner was repelled by the first respondent as

referred to above.

From the facts recorded above, it could be seen that the petitioner who stood to all the tests was eventually found to be lowest tenderer, and second respondent was the second lowest tenderer and the third tenderer is not a party before this court. It is to be further seen that the second respondent did not challenge the selection of the petitioner as lowest tenderer nor did he express any dissent about his non-selection nor there was any Writ Petition filed by the second respondent before this court, challenging the impugned proceedings.

Sri Md. Ali, learned counsel appearing for the second respondent, of course, vehemently argued the matter and also sought time for filing counter affidavit.

At this stage, the learned counsel appearing for the first respondent stated that the order-dated 2.2.2005, which is impugned herein, would be reviewed within four weeks from today.

In view of the above statement made by the counsel appearing for the first respondent, I do not find any justifiable reasons to postpone the decision in this Writ Petition, nor I feel it appropriate to keep this Writ Petition pending any longer.

However, having regard to the facts and circumstances, particularly, in view of the statement made by the counsel for the first respondent that the impugned order dated 2.2.2005 would be reviewed within four weeks, I feel it expedient to set aide the same without expressing any opinion on merits of the case.

It is further made clear that the averments made by the petitioner in the Writ Petition and the counter averments made by the second respondent orally, need not be taken into account. In other words, uninfluenced by any of the statements made either in the Writ Petition by the petitioner against the second respondent or orally by the second respondent against the petitioner, I feel it expedient to direct the first respondent to review the matter afresh and take a final decision suitably, with reasons.

In the result, the Writ Petition is allowed and the impugned order dated 2.2.2005 of the first respondent is set-aside with a direction to the first respondent to review the whole situation afresh within a period of four weeks from the date of receipt of a copy of this order. No costs.

D.S.R. VARMA, J

DATED: 08.04.2005

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To

1 The Managing Director, Andhra Pradesh Power Generation Corporation Ltd., (APGENCO) Vidyut Soudha, Hyderabad – 500 082

2 The Managing Director, M/s. The Indure Pvt. Ltd., Indure House" Greater Kailash-II New Delhi-110048

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